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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL ROCHELLE BROWN, Defendant and Appellant.	C046220 (Super. Ct. No. 03F08335)

A jury convicted defendant Samuel Rochelle Brown of selling or furnishing heroin (Health & Saf. Code, § 11352, subd. (a)). The trial court found defendant had one prior violent felony conviction within the meaning of the "three strikes law" (Pen. Code, § 1170.12, subd. (a); further section references are to this code unless otherwise specified) and sentenced him to state prison for eight years.

On appeal, defendant contends (1) the evidence does not support his conviction for selling or furnishing heroin because

he was merely a drug procuring agent for an undercover police officer, and (2) the trial court committed sentencing errors by failing to strike defendant's prior violent felony conviction, by sentencing him to a term violating the California Constitution's prohibition against cruel or unusual punishment, and by punishing him for exercising his right to a jury trial. We disagree and shall affirm the judgment.

FACTUAL BACKGROUND

On September 24, 2003, Officer Scott MacLafferty and other officers were conducting "buy/bust" operations in Oak Park to apprehend street-level drug dealers.

Acting undercover, MacLafferty drove to Days Market, where he asked defendant, "Is there any black out today? I'm looking for a thirty dollar piece." Black is "a street slang term for tar heroin." Defendant looked around and replied "something to the effect of, I don't see anybody out. Let me go check." He then walked around the corner of the market. About a minute later, defendant reappeared and said, "I don't see anybody out. Let me get in and I'll take you to it." Defendant got into MacLafferty's pickup truck and directed him to a house that had been the subject of two past narcotics investigations. MacLafferty gave defendant $30 and said he would give him $5 if he came back with a "fat" piece of heroin. Defendant went into the house, but returned without any drugs.

At defendant's direction, MacLafferty drove to another location, where defendant told him to pull over. Defendant got out of the truck and spoke with Luther Gilmer, who was standing

on the sidewalk. Gilmer pulled out an item from his sock, and defendant picked at something in Gilmer's hand.

Defendant then ran two houses down the street, spoke with a man standing on the porch, and went into the house with the man. Defendant emerged a minute later, jumped into MacLafferty's truck, and in a frantic and alarmed voice said, "Go, go, go. Hurry up." Defendant claimed he "had just stiffed that guy for some money." Defendant showed MacLafferty what appeared to be four $10 pieces of tar heroin and gave him two pieces. Since MacLafferty had given defendant $30, MacLafferty asked for another piece, but defendant refused to give it to him.

MacLafferty then gave a prearranged arrest signal to Officer Kyle Jasperson, who pulled over the truck. After a struggle, defendant was arrested. The officers recovered $15 in marked bills from defendant and a $20 marked bill from Gilmer.[1]

Defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]) and admitted that he took MacLafferty to get the heroin and that he purchased and delivered it to MacLafferty in exchange for $5.

At trial, defendant testified that he was 55 years old and had been a heroin addict for 30 years. He tried unsuccessfully to quit on numerous occasions, but could remain free of heroin

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[1] Codefendant Gilmer entered a negotiated plea of no contest to selling or furnishing heroin and possessing heroin for sale, in exchange for a four-year prison sentence.

only when incarcerated. Defendant explained that he had gone to Days Market to borrow money from a friend, but the friend was not there. Defendant agreed to help MacLafferty purchase heroin because he would receive $5 from the sale and because he thought MacLafferty would be robbed by youngsters in the neighborhood.

DISCUSSION

I

Defendant claims the evidence is insufficient to support his conviction for sale or furnishing heroin because, at most, he was acting as a "procuring agent" for the government. Thus, he argues, his conviction must be reduced to simple possession of heroin. The contention fails.

Where a "defendant was acting solely as the agent of the buyer, and had no partnership connection to the seller," this "has been termed the 'procuring agent' defense," which "has not been recognized in California [citation] . . . ." (*People v. Reyes* (1992) 2 Cal.App.4th 1598, 1604.) Indeed, the California Supreme Court has stated, albeit in dictum, that "one who acts as a go-between or agent of either the buyer or seller clearly may be found guilty of furnishing as an aider and abettor to the seller." (*People v. Edwards* (1985) 39 Cal.3d 107, 114, fn. 5 (hereafter *Edwards*).)

Defendant acknowledges that the procuring agent defense has been met with "widespread disfavor" in state and federal courts. Nevertheless, he sets forth a number of policy considerations in favor of the defense, and urges us to "take the lead and reconsider California's failure to recognize . . .

that the defense is available . . . ." In defendant's view, we may do so despite the above-quoted passage from the Supreme Court's opinion in *Edwards* because it was "obviously dict[um]."

"'Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive. [Citation.]' [Citation.] Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court. [Citation.] That was good advice then and good advice now." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.)

We are persuaded by the dictum of *Edwards*, and unconvinced by defendant's argument. Accordingly, we reject his invitation to bring life to the discredited procuring agent defense.

II

Defendant contends the trial court erred in sentencing him as a second strike offender, violated the proscription against cruel or unusual punishment, and punished him for exercising his right to a jury trial. We disagree.

At the beginning of trial, defendant moved to dismiss his prior violent felony conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (hereafter *Romero*), arguing he was a third party who received $5 for the deal, was a chronic drug addict, and was not a long-term violent offender. The People responded that defendant's prior violent felony conviction involved his stabbing of a victim who required hospitalization, his criminal record spanned three decades, and two of his other strike prior

convictions had already been dismissed. The trial court indicated its tentative ruling was not to strike the prior violent felony conviction, noting that defendant's criminal history included three convictions for narcotics in the past six years and that efforts in drug treatment had been unsuccessful.

The trial court then placed on the record the People's plea offer of a four-year prison sentence, and stated that defendant's maximum prison exposure was 10 years if he proceeded to trial.

Over one month later, after the jury returned its guilty verdict, defendant renewed his *Romero* motion. Noting this was "a sad case where clearly substance abuse has played a major role in [defendant's] life," the trial court denied the motion due to defendant's lengthy criminal history dating back to 1971, the fact he was on probation when the crime occurred, and his failure to perform adequately on probation. Defense counsel commented that the eight-year sentence was "extreme."

A

The three strikes law is intended to restrict a court's discretion in sentencing repeat offenders. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (hereafter *Carmony*).) In exercising discretion whether to strike a prior conviction for purposes of sentencing, a trial court "'must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted

of one or more serious and/or violent felonies.' [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

Defendant urges us to review de novo the trial court's ruling and to exercise our independent judgment as to whether the prior violent felony should have been stricken. But the California Supreme Court has indicated that a trial court's decision not to strike a prior violent felony conviction pursuant to section 1385 is reviewed under "the deferential abuse of discretion standard." (*Carmony, supra,* 33 Cal.4th at p. 374.)

Nevertheless, characterizing the trial court's decision as a "cursory ruling," defendant argues that the court abused its discretion (1) by giving "absolutely no consideration" to the fact that defendant "act[ed] solely at the government's behest in middling a sale" of heroin, and inflicted no harm other than "towards himself as consumer," (2) by enhancing his punishment based on his "status as a narcotics addict," and (3) by failing to appreciate that, in defendant's view, "he had not been a danger to society worthy of increased incarceration for over ten years."

Contrary to defendant's claim, the fact he aided and abetted the undercover officer's purchase of heroin does not make him less culpable. (See discussion, *ante*.) Indeed, as the People point out, defendant "was not a passive participant" in the offense. He demonstrated his knowledge of drug trafficking in the area, and for personal monetary profit, he accompanied the officer to different locations, ultimately facilitating the purchase and keeping some of the heroin for himself.

And it simply is untrue to say that the trial court punished defendant for his status as a narcotics addict. Instead, the court acknowledged the "sad" fact of defendant's drug problem but declined to strike the prior violent felony conviction because of defendant's lengthy criminal history dating back to 1971, the fact that he was on probation when the current crime occurred, and his failure to perform adequately on probation. In any event, we agree with the People that defendant's drug use "does not reduce, but enhances, his threat to public safety and security" because it "demonstrates a propensity to continue violating the law." (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 963-964 ["when a defendant has a drug addiction or substance abuse problem, where the defendant has failed to deal with the problem despite repeated opportunities, where the defendant shows little or no motivation to change his life style, and where the substance abuse problem is a substantial factor in the commission of crimes, the need to protect the public from further crimes by that individual suggests that a longer sentence should be imposed, not a shorter sentence"].)

Lastly, defendant's claim that he had not been a danger to society for over ten years mischaracterizes his extensive criminal history. Defendant had at least 11 felony convictions,[2] including

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[2] The probation report does not indicate defendant had a 1971 conviction for kidnapping that was alleged in the information as a strike and acknowledged by defendant in his *Romero* motion. The kidnapping conviction was dismissed as a strike allegation at the People's request.

a robbery of a 7-Eleven store while armed with a pistol in 1971; being a convicted felon in possession of a firearm in 1977; second degree burglary and grand theft in 1981; felony petty thefts in 1983 and 1990; assault of a stranger with a knife in 1990; possession of narcotics in 1998, 2000, and 2001; and "Promoting a Dangerous Drug, 3rd degree (Heroin)" in Hawaii just six months before the current offense. In addition, defendant had 15 misdemeanor convictions, including being under the influence of narcotics in 1978 and 1985, assault in 1986, resisting or obstructing an officer in 1986, contempt of court five times in 1994, driving without a license and driving without insurance in 1994, shoplifting in 1994, attempted theft in 1994, violating the duty to give information in 1995, and petty theft with a prior in 1996. At the time of his current crime, defendant was on two grants of probation.

Given defendant's extensive criminal recidivism, the trial court properly exercised its discretion in concluding defendant does not fall outside the letter and spirit of the three strikes law.

B

In another attack on his eight-year sentence for selling or furnishing heroin, defendant contends it constitutes "cruel or unusual" punishment within the meaning of California's Constitution.

The People correctly respond that this claim is barred because it was not raised in the trial court. Defense counsel's passing remark that the eight-year sentence is extreme was not sufficient to preserve this fact-specific issue for appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38

Cal.App.4th 1, 27; see *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

In any event, the contention fails on the merits. Punishment may violate California's Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The determination of whether a sentence is cruel or unusual focuses not solely on a person's current crime, but also on the offender, including his age, prior criminality, personal characteristics, and state of mind. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Although defendant's current offense of selling or furnishing heroin was not a serious or violent felony, it was not criminally insignificant. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1002 [115 L.Ed.2d 836, 870].) His criminal history is lengthy--at 55 years of age, defendant had a record of crime spanning 30 years; he was on two grants of probation when he committed the current offense; and his last conviction also was for a drug-related offense that occurred just six months before the current offense. And his prospects appear bleak--he has been a heroin addict for 30 years, with a pattern of going in and out of jail and prison, and trying but failing numerous times to quit using heroin.

On this record, defendant's eight-year sentence for selling or furnishing heroin does not shock the conscience or offend fundamental notions of human dignity.

C

Lastly, defendant argues that "a sentence to eight years following trial gives rise to an issue of vindictiveness towards appellant for not accepting the prosecution's offer and going to trial on the charge." According to defendant, the trial court placed "considerable emphasis" on the People's offer of a four-year prison sentence and "implicitly warned [defendant] that he would be foolish not to accept the prosecution's offer." Defendant's contention is frivolous.

A court may not offer to treat a defendant more leniently in return for a plea of guilty or nolo contendere, nor may it punish a defendant more harshly for exercising the right to trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279; *People v. Collins* (2001) 26 Cal.4th 297, 307.) However, the mere fact that a more severe sentence is imposed after trial than had been offered during plea negotiations does not itself support the inference that the defendant has been penalized for the exercise of a constitutional right. (*People v. Szeto* (1981) 29 Cal.3d 20, 35.)

Here, the court's decision to sentence defendant to prison for the middle term of four years, doubled because of defendant's prior violent felony conviction, was in no way predicated on defendant's election to forego the plea offer and proceed to trial. The court articulated, in precise terms, the reasons for its decision not to exercise discretion and strike defendant's prior violent felony. It noted defendant's lengthy criminal history, his inability to remain free from criminality, and the fact he was on probation when the crime was committed. Before trial, the court, for defendant's

benefit, made clear the People's four-year offer so defendant would understand he faced a maximum 10-year sentence if he elected to proceed to trial. These statements made *over one month before* sentencing in no way indicated the court was motivated by anything other than legitimate reasons when it imposed the eight-year term. Indeed, when the court advised defendant of his maximum exposure, it already had articulated the reasons why it tentatively, and correctly, concluded there was no legitimate basis upon which to strike defendant's prior violent felony conviction for the purpose of sentencing.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

MORRISON, J.

BUTZ, J.